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In the Supreme Court of the United States

OCTOBER TERM, 1973

LONNIE GOODING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 24) is reported at 477 F. 2d 428. The opinion of the district court (A. 17) is reported at 328 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1973. A petition for rehearing with suggestion for rehearing *en banc* was denied on May 11, 1973 (A. 53). The petition for a writ of certiorari was filed on June 7, 1973, and was granted on October 15, 1973 (A. 54). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

531-859—74——2

QUESTIONS PRESENTED

1. Whether a search occurring at 9:30 p.m. is a nighttime search.

2. Whether under applicable provisions of the District of Columbia Code a special showing of necessity is required to obtain authorization for nighttime execution of a warrant to search for narcotics.

3. Whether under 21 U.S.C. 879(a) a special showing of necessity is required to obtain authorization for nighttime execution of a warrant to search for narcotics.

4. Whether, assuming no special showing of necessity is required for nighttime execution of a warrant under Section 879(a), an otherwise valid nighttime search warrant is invalidated because it was obtained by members of the Metropolitan Police of the District of Columbia.

5. Whether the federal courts should invoke their supervisory powers to suppress evidence obtained pursuant to a warrant issued by a United States magistrate, where the alleged defect in the warrant did not result in a violation of the Fourth Amendment and was at most the product of a good-faith error of judgment on the part of the magistrate.

STATUTES AND RULES INVOLVED

21 U.S.C. 879(a) provides:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe

that grounds exist for the warrant and for its service at such time.

18 U.S.C. (1964 ed.) 1405 provided:

> In any case involving a violation of any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code, a violation of subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or a violation of the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a)—
>
> (1) a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist, and
>
> (2) a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions.

Former Rule 41 of the Federal Rules of Criminal Procedure (18 U.S.C. App., 1970 ed.) provided in pertinent part:

> (c) * * * The [search] warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. * * *
>
> * * * * *
>
> (g) This rule does not modify any act, inconsistent with it, regulating search, seizure

and the issuance and execution of search warrants in circumstances for which special provision is made. * * *

Rule 41 of the Federal Rules of Criminal Procedure, effective October 1, 1972, provides in pertinent part:

(c) *Issuance and Contents.* A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execu-

tion at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

* * * * *

(h) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

4 D.C. Code 138 provides:

> Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force, without any backing or indorsement of the warrant, and according to the terms thereof; and all provisions of law in relation to bail in the District shall apply to this chapter.

Pertinent parts of Title 23 of the District of Columbia Code provide:

> Section 521(a)—Under circumstances described in this subchapter, a judicial officer may issue a search warrant upon application of a law

enforcement officer or prosecutor. A warrant may authorize a search to be conducted anywhere in the District of Columbia and may be executed pursuant to its terms.

Section 521(f)(5)—[A search warrant shall contain] a direction that the warrant be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1), an authorization for execution at any time of day or night;

Section 522(c)(1)—The application may also contain—a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances; * * *

Section 523(b)—A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant pursuant to section 23–521(f)(5), shall be executed only during the hours of daylight.

33 D.C. Code 414 provides in pertinent part:

(a) A search warrant may be issued by any judge of the Superior Court of the District of Columbia or by a United States commissioner for the District of Columbia when any narcotic drugs are manufactured, possessed, controlled, sold, prescribed, administered, dispensed, or compounded, in violation of the provisions of this chapter, and any such narcotic drugs and any other property designed for use in connec-

tion with such unlawful manufacturing, possession, controlling, selling, prescribing, administering, dispensing, or compounding, may be seized thereunder, and shall be subject to such disposition as the court may make thereof and such narcotic drugs may be taken on the warrant from any house or other place in which they are concealed.

* * * * *

(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

* * * * *

(h) The judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night.

33 D.C. Code 709 provides:

(a) A search warrant may be issued upon probable cause, supported by affidavit particularly describing the property to be seized and place to be searched, by any judge of the Superior Court of the District of Columbia or by the United States Commissioner for the District of Columbia, to any officer of the Metropolitan Police Department when any dangerous drugs are manufactured, possessed, prescribed, and delivered in violation of the provisions of this chapter, and any such dangerous drugs and any other property designed for use in connection with such unlawful manufacturing, possession, prescribing, or delivery, may be seized thereunder and shall be subject to such disposition as

the court may make thereof, and such dangerous drugs may be taken on the warrant from any house or other place in which they are concealed.

(b) Any search warrant issued in accordance with the provisions of subsection (a) of this section may be served at any time in the day or night and must be executed and returned to the issuing authority within ten days after its date.

STATEMENT

1. On February 11, 1971, Officer Marion L. Green of the Metropolitan Police of the District of Columbia appeared before a United States Commissioner sitting in the United States District Court for the District of Columbia and applied for a warrant to search petitioner's residence for narcotics and related drug paraphernalia, which he had probable cause to believe petitioner was possessing in violation of Section 4704 (a) of Title 26 of the United States Code (1964 ed.). In the supporting affidavit, the sufficiency of which to establish probable cause for the issuance of a search warrant was not disputed (Tr. 20, 51), Officer Green affirmed that on February 9, 1971, an informer of proven reliability told him that petitioner was engaged in selling heroin at his apartment. Pursuing this tip, Green and another officer, after searching the informant, accompanied him to petitioner's apartment building during the evening hours (Tr. 23). There, the informant, observed by Green, entered petitioner's apartment; he left a few minutes later carrying heroin (A. 8).

Based on the foregoing facts, the United States Commissioner issued a warrant to search petitioner's apartment and directed that the warrant might be served "at any time in the day or night" (A. 10). At 9:30 p.m. the following day (February 12, 1971), Green and other local law enforcement officers proceeded to petitioner's apartment with the search warrant. After the officers knocked at the door, they responded to an inquiry from a man inside that they were police officers with a search warrant (Tr. 10, 38). Fifteen to thirty seconds then elapsed, during which the sound of running footsteps was heard, leading the officers to conclude that petitioner was attempting to dispose of the narcotics (Tr. 10, 32–33). The officers then broke open the door and observed petitioner hastening to a back room (Tr. 10–12, 41).[1] After apprehending him, they discovered in his pockets seven tin-foil packets containing heroin (Tr. 15). On a chair next to the bed they found more narcotics and various types of narcotics paraphernalia (Tr. 12–13, 36–37). The total amount of heroin seized was 5,240 milligrams, which was sufficient to make one hundred heroin capsules (Tr. 17–19).

2. On April 6, 1971, a grand jury empanelled in the United States District Court for the District of Columbia returned a two count indictment charging peti-

[1] Petitioner alleged in his motion to suppress, and two witnesses for petitioner testified at the suppression hearing, that the officers did not knock before forcing entry into petitioner's apartment. This alleged entry without knocking was not ruled upon by the district court or the court of appeals and is not in issue before this Court (Pet. Br. 3, n. 3).

tioner with violations of 26 U.S.C. (1964 ed.) 4704(a) (possession of narcotic drugs not in the original stamped package) and 21 U.S.C. (1964 ed.) 174 (concealment of narcotic drugs, knowing them to have been illegally imported).[2] Petitioner moved to suppress the evidence seized in the search. He alleged that the nighttime execution of the warrant had failed to comply with the provisions of 23 D.C. Code 521–523 (set forth at pp. 5–6, *supra*)[3] and that the United States Code provision for nighttime execution of a drug related search warrant, 21 U.S.C. 879(a) (set forth at pp. 2–3, *supra*)[4] does not apply to the warrants executed by the Metropolitan Police of the District of Columbia. The standards for nighttime searches under Title 23 are stricter than those of 21 U.S.C. 879, and there was no dispute that the application for the warrant in this case did not meet the Title 23 requirements (A. 26).

On June 14, 1971, the district court granted petitioner's motion to suppress (A. 17–21). It held that search warrants issued by United States District Court judges and magistrates (as opposed to officials of the local District of Columbia courts) and relating specifically to violations of federal laws come within the ambit

[2] These provisions were repealed, effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub. L. 91–513, 84 Stat. 1236, 1291–1292).

[3] These provisions, part of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. 91–358, 84 Stat. 473, 614–615), became effective on February 1, 1971.

[4] This statute was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1236, 1274. Section 879(a) became effective on October 27, 1970.

of local law, *i.e.*, Title of the District of Columbia Code, rather than 21 UC. 879(a). The district court further held that 23 D.Code 521–523, is a special statute supereceding a prioneral statute (21 U.S.C. 879 (a)) and that Section21–523 make no distinction between warrants invding local offenses and warrants involving offenseander the United States Code (A. 19–20).

3. The United Stateppealed to the court of appeals pursuant to 18 .S.C. 3731 (A. 22–23). On March 26, 1973, that ct entered a judgment reversing the order of the driet court. Each of the three judges of the court of peals wrote an opinion; each agreed that the distri court's motion to suppress should be reversed on e ground that the nighttime search of petitioner's sidence was governed by 21 U.S.C. 879(a), not by D.C. Code 521–523. Writing the opinion for the co:, Judge Wilkey pointed out that 21 U.S.C. 879(a) is more specific as to subject matter ("search in natics cases") and more recent than Title 23 (becauseconsidered and passed" after Title 23); hence, its tes should prevail (A. 28). As to the precise requirents of Section 879(a), Judge Wilkey held that, likes immediate predecessor (18 U.S.C. (1964 ed.) 140: Section 879(a) required for nighttime execution of drug-related search warrant only a normal showing probable cause to believe that the contraband sought ll be found on the premises at any time. It "requirenly *grounds* for service at night in the sense thate narcotics sought will probably be present on thamed property at night" (A. 30, 36).

In his concurring opinion, Judge Fahy was of the view that as between the nighttime search warrant provisions of Title 23 and those of 33 D.C. Code 414, the latter, dealing specifically with drug violations, should prevail. However, as between 33 D.C. Code 414 and 21 U.S.C. 879(a), he was of the view that Section 879(a) governs, because he viewed Section 414 as applying only to violations of local District of Columbia provisions. He, too, considered Section 879(a) as requiring only a showing of probable cause that grounds for the application exist (A. 36–42).

Finally, Judge Robinson also concluded that 21 U.S.C. 879(a) controlled over local District of Columbia statutes. He did not, however, agree that Section 879(a) required only a showing of probable cause for a nighttime search; rather, he concluded that Congress in passing Section 879(a) had intended to require a demonstration of "something above and beyond" the showing of probable cause that would normally support the issuance of a search warrant (A. 50). Judge Robinson, however, viewed the instant affidavit as meeting this test, since it provided grounds for belief not only that drugs were kept in petitioner's apartment but also that a drug peddling operation persisted therein. Judge Robinson concluded: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated" (A. 52).

SUMMARY OF ARGUMENT

Petitioner challenges the validity of a warrant pursuant to which a search of his premises was made at approximately 9:30 p.m. on February 12, 1971. Although there was concededly probable cause to believe that narcotics and narcotic paraphernalia would be found in his apartment, and although the warrant complied in all respects with the Warrant Clause of the Fourth Amendment and expressly authorized execution at night, petitioner argues that the application for the warrant failed to make the requisite showing of necessity which he claims is mandated by 23 D.C. Code 521–523 and 21 U.S.C. 879(a) before the magistrate may authorize a nighttime search. This claim, which has been rejected by both the Court of Appeals for the District of Columbia Circuit and the District of Columbia Court of Appeals, is based upon an erroneous interpretation of the various provisions governing nighttime searches in narcotics cases, and in this particular case ignores the fact that the search at issue here was not a nighttime search. Moreover, petitioner erroneously assumes that, if his interpretation of the various statutes is correct, any evidence obtained must be suppressed.

I

A. The two statutes which petitioner claims were not complied with here, 23 D.C. Code 521–523 and 21 U.S.C. 879(a), do not purport to specify when a search is a nighttime search for the purpose of the

special showing petitioner alleges is mandated. Rule 41(h) of the Federal Rules of Criminal Procedure, however, defines such a search as one taking place between the hours of 10 p.m. and 6 a.m. This search took place at 9:30 p.m. Since the same basic policy considerations—that searches conducted in the middle of the night, during the hours when persons are likely to be asleep, involve a greater intrusion than ordinary searches and therefore require a greater justification—apply to searches regardless of the statutory provision under which they are conducted, there is no sound basis for applying a different definition of a nighttime search under 21 U.S.C. 879(a) and 23 D.C. Code 521–523 than is applicable to nighttime searches generally under Fed.R.Crim.P. 41(c).

B. There are three separate provisions in the District of Columbia Code dealing with nighttime searches. Title 23 of the D.C. Code (Sections 521–523), upon which petitioner relies, is the equivalent of Fed.R. Crim.P., Rule 41, and generally prescribes the conditions for the issuance of search warrants. Enacted in 1970, it imposes a requirement of a specific showing, the nature of which is clearly described, in order for authorization of nighttime execution to be obtained.

Although the standards set out in Title 23 were not complied with here, there are two special statutes in the D.C. Code which permit search warrants to be issued for execution at any time of the day or night, without any special showing, where the search is made for narcotics (33 D.C. Code 414(h)) or for certain dangerous drugs other than narcotics (33 D.C. Code 709(b)). Section 414(h) of Title 33, rather than the

more restrictive provisions of Title 23, is controlling here, since it deals specifically with narcotics cases.

Moreover, the warrant was not invalid under Section 414 because it did not state in so many words that the narcotics sought to be seized were being possessed in violation of Chapter 33 or because the commissioner allegedly failed to "examine" the law enforcement officer under oath. The application for the warrant clearly set forth facts establishing a violation of 33 D.C. Code 402(a), and there is no constitutional, statutory or other authority requiring that the statutes alleged to be violated must be specified on the face of a search warrant. Similarly, it is apparent from the face of the record that both the "examine on oath" and the affidavit requirements of Section 414(c) were complied with when the magistrate asked Officer Green if the statements in the affidavit were true, and he so swore.

C. If the Court nevertheless concludes that the procedural requirements of 33 D.C. Code 414 were not complied with, the lawfulness of the search may still be sustained because it was authorized in conformity to the requirements of 21 U.S.C. 879(a), which was intended to carry forward a scheme for the issuance of drug-related search warrants similar to the procedure in the District of Columbia.

The dissatisfaction with the "positivity" requirement of former Rule 41(c) for nighttime searches which led to the adoption of the special nighttime search statutes in 1956 in the District of Columbia also prompted the adoption of former Section 1405 of Title 18 (the predecessor to 21 U.S.C. 879(a)).

Section 1405 authorized a nighttime search upon a simple showing of probable cause with respect to the offense and the presence of the items sought at the place to be searched. It rejected the requirement of former Rule 41(c) that the applicant for the warrant be "positive" that the property sought is in the place to be searched.

When Congress revised Section 1405 in 1970, it did so in order to expand the liberal nighttime search provisions to cases involving stimulant and depressant drugs as well as narcotic drugs. Although the language of the new provision, considered in a vacuum, tends to support the claim that some special showing is required to obtain authorization for nighttime execution of a warrant under Section 879(a), the legislative history plainly sustains the conclusion of every appellate court which has considered the issue that no change was intended in the application or meaning of the nighttime search provisions of former Section 1405.

Moreover, assuming that some kind of showing other than probable cause for issuance of the warrant itself is required for authorization of nighttime execution, we agree with Judge Robinson's conclusion that the requirement is significantly less stringent than under 23 D.C. Code 521–523 and was satisfied in this case. As he stated in his concurring opinion: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated" (A. 52).

D. Although petitioner attempts to show that the warrant did not comply with Section 879(a), his principal claim is that Section 879(a) is not applicable here at all (Br. 13), and that even if Section 879(a) permits a nighttime search without a showing of necessity in cases of suspected violations of the United States Code, that statute is only applicable where the search is conducted by "members of the Bureau of Narcotics and Dangerous Drugs" (Br. 34–35). But this claim ignores the fact that Congress did not repeal the special provisions in Title 33 of the D.C. Code, which permit nighttime searches to be made in narcotics cases without any special showing. It is anomalous to argue that Metropolitan Police may obtain a nighttime warrant without any special showing in cases involving a suspected violation of the local narcotics laws, but that when they obtain such a warrant in cases involving a suspected violation of the United States Code (as they are clearly authorized to do by 4 D.C. Code 138), such a special showing is required by 23 D.C. Code 521–523, even though not required under 21 U.S.C. 879(a).

This consideration aside, there is nothing in the legislative history of the Title 23 provisions to support any such intent on the part of Congress. That title, including the search warrant procedures contained therein, was intended to apply to a new local court system and to prosecutions brought within it, rather than to regulate the district police when engaged in federal investigations. To the extent that the legislative history of Sections 521–523 sheds light on the issue here, it shows these provisions were adopted

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for two reasons: (1) because the District of Columbia Code at the time had no general provision relating to the time of executing search warrants; and (2) because of the intention to replace, by means of such a general provision, the "positivity" test of the Federal Rules with what was considered a superior "need" test. Petitioner does not claim that the new test in Sections 521–523 repealed the special provisions of Section 879(a) of the United States Code applicable to narcotic searches or that it repealed the statute authorizing the Metropolitan Police to execute federal search warrants (4 D.C. Code 138). His claims that the validity of a nighttime search in the District of Columbia in cases involving suspected violations of the United States Code should depend on the uniform worn by the law enforcement officer executing it is thus without support in the legislative history of Sections 521–523.

II

Even if it is ultimately determined that the magistrate erred in authorizing nighttime execution of this warrant, we submit that the evidence seized pursuant thereto should not be suppressed. The warrant and the underlying affidavit here at issue complied in all respects with the Warrant Clause of the Fourth Amendment. The only authority for application of an exclusionary rule here would derive from exercise of the Court's supervisory powers. The exercise of these powers is guided principally "by considerations of justice," *McNabb* v. *United States,* 318 U.S. 332, 341, and the process necessarily affords substantial room for the exercise of discretion to determine

whether an evidentiary rule of exclusion in a given case is essential to effectuate the policy which Congress has formulated.

Although recent studies have cast doubt upon the success of the exclusionary rule as a device for deterring illegal searches and seizures by the police, we do not here challenge the assumption that an exclusionary rule does in fact tend to encourage obedience by law enforcement officers to constitutional and statutory commands. Nevertheless, it is our submission that where, as here, authorization for the search has been obtained in good faith from a neutral and detached magistrate, and the defect in procedure results from an error of judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement officers and does not provide a suitable occasion for exercise of the Court's supervisory powers.

ARGUMENT

I. THE EXECUTION OF THE WARRANT COMPLIED WITH THE UNITED STATES AND DISTRICT OF COLUMBIA CODES

A. THE SEARCH WAS NOT A NIGHTTIME SEARCH

Petitioner's claim that the warrant could not validly have authorized a search at any hour of the day or night because it did not contain the special showing which he claims is required under 21 U.S.C. 879(a) and 23 D.C. Code 522–523, assumes that the search conducted here at 9:30 p.m. was a nighttime search within the meaning of those statutes. This assumption is erroneous.

1. Section 879(a)

Section 879(a) of Title 21, which permits execution of a warrant at "any time of the day or night" if the judge or United States magistrate is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time, does not contain any specific definition of what constitutes a nighttime search. If the search at issue here had been conducted after October 1, 1972, it would clearly not have constituted a nighttime search, since Rule 41(h) of the Federal Rules of Criminal Procedure, which was promulgated by this Court and became effective as of that date, specifically defines "daytime," for the purpose of identifying the period during which a warrant may be served without any special showing, to be the "hours from 6:00 a.m. to 10:00 p.m." While Rule 41 was not intended to modify any act "inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made" (Rule 41(h)), there is clearly no inconsistency between Rule 41 and Section 879(a) (or 23 D.C. Code 522–523).

Although Rule 41(h) was not in effect at the time of the issuance of this warrant, there is no sound reason to apply a different definition to searches which took place prior to October 1, 1972.[5] The case law defining nighttime searches prior to the adoption of Rule 41(h)

[5] "The general rule * * * is that an appellate court must apply the law in effect at the time * * * [of] its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281–282; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110.

consisted of confusing and conflicting decisions which ignored the underlying reasons for the disfavor with which nighttime searches are viewed, *i.e.*, that citizens should not be disturbed during hours when they are likely to be asleep by "the extremely serious intrusion of a midnight entry"[6] by police officers into their homes.

Looking largely to technical definitions of the words "daytime" and "nighttime," rather than the critical considerations of policy, it has been held that daytime "continued as long as there was sufficient light or reflection from the sun to enable one readily to recognize a man's features at a reasonable distance" (*Moore* v. *United States*, 57 F.2d 840, 843 (C.A. 5)); that it is still daytime if there is sufficient daylight to read the warrant (*United States* v. *Woodson*, 303 F.2d 49 (C.A. 6)); or that "it is daytime for at least thirty minutes after the time when the sun sets, and it is nighttime from then until thirty minutes before the time when the sun rises" (*United States* v. *Liebrich*, 55 F.2d 341, 343 (M.D. Pa.)).

There is no reason why this Court should apply any of these technical definitions here, when it has already promulgated, and Congress has already accepted, a definition that is faithful to the policies underlying restrictions on nighttime searches.

2. 23 D.C. Code 522–523.

The foregoing discussion applies with equal force to Sections 522–523 of Title 23 of the D.C. Code. While that statute uses the phrase "the hours of daylight"

[6] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477.

in requiring a special showing for searches not made during that period, rather than the term "daytime" employed in Rule 41 of the Federal Rules, no definition of that term is contained in Title 23 of the D.C. Code. And, given the identity of purpose reflected by the restrictions in Rule 41(c) and those of Sections 522–523, there is no reason to regard the definition of "daytime" in Rule 41(c) as "inconsistent" with the synonymous term employed in the D.C. Code.[7] To the contrary, to the extent that the legislative history of Sections 522–523 provides a guide, there is some indication that Congress did not intend a technical and purposeless definition of the term.

The provisions of Sections 522–523, were "patterned after the nighttime search provisions of the proposed New York Criminal Law Procedure [*sic*], prepared by a distinguished commission created in 1961 and submitted to the New York state legislature in 1968 after six years work, including public hearings and circulation of proposed drafts." Crime in the National Capital, Hearings before the Senate Committee on the District of Columbia on S. 2869, S. 2602, and S. 2980, 91st Cong., 1st Sess., Part 4, p. 1404 (hereafter referred to as "D.C. Crime Hearings").

The New York Criminal Procedure Law, after which Sections 522–523 are "patterned," requires a special showing to be made for searches not conducted "between the hours of 6:00 a.m. and 9:00 p.m."

[7] *Webster's Third International Dictionary* (Unabridged), p. 578, defines the noun "daytime" as "the time during which there is daylight" and the adverb "daytimes" as "during the hours of daylight."

N.Y.C.P.L. 690.30, 690.35.[8] This definition, like the definition promulgated by this Court in Rule 41(h), reflects the basic policy consideration that a "greater potential intrusion upon the privacy of persons [results] from * * * nighttime search[es]." D.C. Crime Hearings, *supra,* at p. 1404. Since Congress did not include a specific definition of a "nighttime search" in Title 23, there is no sound reason for this Court to adopt a definition different from that applicable to other nighttime searches under various Acts of Congress.

B. ASSUMING THE SEARCH WAS A NIGHTTIME SEARCH, THE WARRANT COMPLIED WITH THE DISTRICT OF COLUMBIA CODE.

1. The provisions of Title 33 of the D.C. Code, rather than those of Title 23, govern drug-related search warrants

There are three separate statutes in the District of Columbia Code dealing with nighttime searches. 23 D.C. Code 521–523, upon which petitioner relies, is the equivalent of Rule 41 of the Federal Rules and generally prescribes the conditions for the issuance of search warrants. Enacted in 1970, it provides that an application for a search warrant may contain a request that it be made executable at any hour of the day or night "upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is

[8] These provisions, as enacted into law, followed the recommendations of the Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (1967), pp. 397–398 (Edward Thompson Pub. Co.), and, as the Commission stated, they were a carryover from Section 801 of the old New York Code of Criminal Procedure.

likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances" (23 D.C. Code 522(c)(1)).

Although the standards set out in Title 23 were not met by this application, there are two special statutes in the D.C. Code which permit search warrants to be issued for execution at any time in the day or night, without any special showing, where the search is made for narcotics (33 D.C. Code 414(h)) or for certain dangerous drugs other than narcotics (33 D.C. Code 709(b)).

These two statutes were added to the D.C. Code in 1956, the same year in which the United States Code was amended to permit nighttime searches in narcotic cases without any special showing beyond the probable cause necessary to sustain the warrant (18 U.S.C. (1964 ed.) 1405). The Senate Judiciary Committee, which had conducted extensive hearings on "Illicit Narcotics Problem In The District of Columbia," concluded that former Rule 41(c), Fed. R. Crim. P., which was then in effect and which permitted nighttime searches only where the affidavits are "positive" that the property is on the person or in the place to be searched, was handicapping the enforcement of the narcotics laws in the District of Columbia (S. Rep. No. 2033, 84th Cong., 2d Sess., pp. 9–12):

> The greatest single handicap resulting from Federal jurisdiction may well be the extreme difficulty in obtaining evidence of a narcotics violation under the stringent search and seizure

> laws and, subsequently, in getting such evidence before the court.
>
> Nine out of ten transactions in illicit narcotic drugs occur during the nighttime, yet, Metropolitan Police officers, as well as agents of the Federal Bureau of Narcotics, cannot obtain a warrant for a search after nightfall unless they are able to swear to an affidavit and show "positiveness" of evidence, as required by rule 41(c) of the Federal Rules of Criminal Procedure.
>
> * * * * *
>
> Therefore, it is imperative that Congress recognize that agencies of the District of Columbia, as well as Federal investigative agencies who are trying to deal with narcotic racketeering on a national and interstate basis, are very badly handicapped in their efforts to stamp out the illicit narcotics traffic by lack of realistic and intelligent Federal law on the subject of search and seizure.

Accordingly, the Senate Judiciary Committee recommended a change in the "positivity" standard so that "'probable cause' will be sufficient to obtain a search warrant at any time of the night or day" (S. Rep. No. 2033, *supra*, at p. 68).

This recommendation resulted in the passage of two separate statutes for the District of Columbia. Section 709(b) of Title 33 was included in a newly promulgated chapter dealing with the regulation and control of certain drugs other than narcotics. It provided that any warrant issued to seize dangerous drugs under that chapter "may be served at any time in the day or night." Moreover, no special showing is required

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to obtain such a warrant; it could be issued merely "upon probable cause, supported by affidavit particularly describing the property to be seized and the place to be searched" (Section 709(a)).

Congress also amended Section 414(h) of Title 33, which was contained in a previously enacted chapter involving the regulation of narcotic drugs. The amendment eliminated the "positivity" requirement that had previously been contained in Section 414(h) and instead mandated that the judge or commissioner "shall insert a direction in the warrant that it may be served at any time in the day or night."

These sections of Title 33 were not repealed by Congress in 1970 when it revised, codified and enacted Title 23 of the District of Columbia Code as "[t]he general and permanent laws of the District of Columbia relating to criminal procedure" (Section 210(a) of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 604) and included therein Sections 521–523, dealing with search warrants. Those provisions prescribe only the *general* rules regarding the execution of search warrants in the District of Columbia and do not govern narcotics searches.[9] The legislative history of 23 D.C. Code 521–523 (discussed at pp. 46–51,

[9] Sections 521–523 do not purport to treat the numerous particular cases with which Congress had specifically dealt. In addition to 33 D.C. Code 414(h) and 709(b), the following additional statutes regarding search warrants in particular cases were not mentioned in, and presumably not affected by, the enactment of Title 23: 6 D.C. Code 904, 22 D.C. Code 805, 25 D.C. Code 129, and 48 D.C. Code 205 and 305. Petitioner concedes that the validity of these statutes, including Section 414, "is not being challenged by this proceeding" (Pet. Br. 34, n. 49).

infra) shows that the provisions were adopted for two reasons: (1) because the District of Columbia Code at the time had no general provision relating to the time of executing search warrants; and (2) because of the intention to replace, in such a general provision, the "positivity" test of the Federal Rules with what was considered the superior "need" test.[10]

The enactment of this section, however, did not affect the execution of *narcotics* search warrants, since, as noted above, both the United States Code and the District of Columbia Code already contained specific provisions governing the execution of such warrants (33 D.C. Code 414(h) and 709(b); 18 U.S.C. (1964 ed.) 1405). "[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758, and cases cited.[11]

2. Nighttime execution of this warrant was valid under 33 D.C. Code 414(h)

Contrary to the suggestion of Judges Wilkey and Fahy in the court of appeals (A. 29–30, n. 14; 41) the

[10] H. Rep. No. 91–907, 91st Cong., 2d Sess., pp. 109–110; S. Rep. No. 91–538, 91st Cong., 1st Sess., pp. 12–13. See also the testimony of Associate Deputy Attorney General Santarelli, quoted in the District Judge's Memorandum (A. 19–20, note), and the prepared statements of Mr. Santarelli and the United States Attorney for the District of Columbia concerning the proposed nighttime search provisions. Anti-Crime Proposals, Hearings Before Subcommittee Nos. 1 and 3 of the House Committee on the District of Columbia, 91st Cong., 1st Sess. 92, 110; D.C. Crime Hearings, pt. 4, *supra*, at pp. 1389, 1404, 1416.

[11] The District of Columbia Court of Appeals has held that the special provisions of Title 33, and not the general provisions of Title 23, apply to nighttime narcotic searches in the

warrant was not invalid under Section 414(h) because it did not state in so many words that the narcotics sought to be seized were being possessed in violation of Title 33 or because the commissioner allegedly failed to interrogate the law enforcement officer under oath.

a. Section 414(a) authorizes the issuance of a search warrant by a "United States commissioner"—among others—"when any narcotic drugs are * * * possessed, controlled, [or] sold * * * in violation * * * of this chapter." [12] Before issuing the warrant authorizing a search of petitioner's apartment, the Commissioner had made a finding of probable cause to believe that "heroin, capsules, envelopes, syringes, tourniquets, cookers, and paraphernalia used in the preparation of heroin for distribution or use" were concealed there (A. 10). It is beyond dispute that precisely the

District of Columbia. *United States* v. *Thomas*, 294 A. 2d 164, certiorari denied, 409 U.S. 992. "The question as to which of the [allegedly] inconsistent provisions shall govern [which] arises in a local statute confined in its [application] to the District of Columbia" is for the local courts of the District, and this Court will ordinarily not review such decisions. Cf. *District of Columbia* v. *Pace*, 320 U.S. 698, 702. Under the D.C. Court Reorganization Act, of course, the District of Columbia Court of Appeals is the equivalent of the "highest court of a state." 28 U.S.C. 1257; *Palmore* v. *United States*, 411 U.S. 389, 395. The same deference accorded by this Court and the courts of appeals to the construction of state law by a state's highest court should be accorded to constructions placed on the D.C. Code by the District of Columbia Court of Appeals.

[12] The reference in 33 D.C. Code 414(a) to "United States Commissioner" is deemed to mean "United States Magistrate" on and after the date the first United States Magistrate for the District of Columbia assumed office. Pub. L. No. 90-578, § 402(b)(2), 82 Stat. 1118.

same showing also established a violation of 33 D.C. Code 402(a).[13]

We are aware, of course, that the search warrant in issue, which was obtained by local law enforcement officers, specifically referred to violations of the federal narcotics statutes and made no reference to Title 33. We submit, however, that this fact is no bar to finding that the search warrant complied with all the search warrant provisions of Title 33 and was therefore valid thereunder, independently of its validity under any other statutes. There is no constitutional, statutory or other authority requiring that the statutes alleged to be violated must be specified on the face of a search warrant. Indeed, Form 15, Fed.R. Crim.P., Appendix, does not contain a place to include reference to any particular provision of law alleged to have been violated. Thus, search warrants have been upheld where no statute at all was cited, *United States* v. *Averell*, 296 F. Supp. 1004, 1014 (E.D.N.Y.),[14] or where a totally inapplicable provision was relied upon, *Ray* v. *United States*, 10 F. 2d 359 (C.A. 6); cf. *Hysler* v. *United States*, 86 F. 2d 918 (C.A. 5).

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[13] 33 D.C. Code 402(a) provides:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter."

[14] The court in *Averell* suggested that the omission from a search warrant of an item not required by the Fourth Amendment (in *Averell* it was the name of the affiant) could be cured by amendment *after the execution of the warrant*, provided that no prejudice would result. 296 F. Supp. at 1014. The constitutional requirements of designating with specificity what

b. There is likewise no merit to the suggestion that the warrant is defective because the magistrate failed to "examine on oath" the law enforcement officer who applied for the warrant.

Section 414(c) provides that:

> The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

It is apparent from the face of this record that the foregoing requirement was complied with, since Officer Green's affidavits were subscribed and sworn to before Commissioner Margolis (A. 7, 9), and it was he who issued the warrant (A. 10–11). Thus, when the Commissioner asked Officer Green if the statements in the affidavit were true, and he so swore, both the "examine on oath" and the affidavit requirements of the statute were satisfied. To demand some further ritual involving an oral repetition of the facts recited in the affidavit, even though the magistrate is satisfied by the contents of the affidavit and the oath taken in his presence, is to impose a nonsensical requirement that could not possibly have been intended by the drafters of this statute. While the "examine" requirement and the affidavit/deposition requirement are conjunctive, this simply means that the

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was to be seized, where, from whom, and on what grounds have all been met in this case. Appellant cannot claim prejudice from an inability to exclude from evidence against him, on the narrowest of technical grounds, that which was constitutionally seized from his apartment.

complainant's oath must be taken before the magistrate personally (satisfying the first prong) and that the facts relied upon in issuing of the warrant must be reduced to writing (satisfying the second prong), both of which occurred in this case.[15]

C. NIGHTTIME EXECUTION OF THIS SEARCH WARRANT WAS ALSO PROPERLY AUTHORIZED UNDER 21 U.S.C. 879(a)

We have shown in the preceding discussion that the magistrate's authorization of nighttime execution of this warrant was valid under the controlling provision

[15] Section 414(c) "is an almost verbatim reproduction of section 6, Title XI, Espionage Act, June 15, 1917, c. 30, 40 Stat. 229." *Ward* v. *United States*, 281 F. 2d 917, 918 (C.A.D.C.). The Espionage Act (18 U.S.C. (1940 ed.) 616) was in turn taken almost verbatim from provisions of the New York Code of Criminal Procedure, which set out a similar requirement for obtaining arrest and search warrants. H. Rep. Nos. 65 and 69, 65th Cong., 1st Sess., p. 20. ("The new title as presented by the conferees was based upon the New York law on this subject, and follows generally the policy of that law.")

The former provisions of the Espionage Act and the old New York Code of Criminal Procedure have been construed as not mandating that the magistrate conduct actual interrogation of the applicant under oath, where the applicant has filed a satisfactory affidavit, which was subscribed to under oath before the magistrate. *Rose* v. *United States*, 45 F. 2d 459 (C. A. 8); *People ex rel. Livingston* v. *Wyatt*, 186 N.Y. 383; *People* v. *Marshall*, 13 N.Y. 2d 28, 35–36; see also, *Laughran* v. *Kelly*, 62 Mass. 199. Moreover, when the provisions of the Espionage Act were replaced by Rule 41 of the Federal Rules of Criminal Procedure, which provides that "[a] warrant shall issue only on affidavit sworn to before the judge or commissioner," the Notes of the Advisory Committee stated the provision "is a restatement of existing law, 18 U.S.C.A. former §§ 613–616, 620; *Dumbra* v. *United States*, 45 S. Ct. 546, 268 U.S. 435, 69 L. Ed. 1032." 18 U.S.C.A. Fed.R.Crim.P., Rules 32 to End, p. 213.

of the D.C. Code, which suffices to sustain the legality of the search and seizure of heroin and narcotics paraphernalia from petitioner. If, however, this Court disagrees that Title 33 sets forth the controlling provision or concludes that its procedural requirements were not here complied with, we submit that the lawfulness of the search may nevertheless be sustained if it was authorized in conformity to the requirements of 21 U.S.C. 879(a). The issue of whether that general federal statute is somehow repealed or its applicability in the District of Columbia is limited by 23 D.C. Code 521–523 is discussed in Part I(D), *infra;* in this section of our brief, we address the question of the correctness of the magistrate's action in authorizing nighttime execution under 21 U.S.C. 879(a) generally.

1. The Background of Section 879(a)

The scheme for the issuance of search warrants set out in the United States Code and the Federal Rules of Criminal Procedure is similar to the provisions in the District of Columbia. We have previously shown that, until 1956, the "positivity" requirement for the issuance of search warrants which was mandated by former Rule 41(c) was applicable to all searches in the District of Columbia and, with certain exceptions not here relevant, to search warrants issued by United States magistrates arising out of violations of the United States Code.

The same considerations which led to the adoption of the special nighttime search statutes in the District of Columbia also prompted the adoption in 1956 of former Section 1405(1) of Title 18, which provided that, in narcotics cases:

> [A] search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist * * *.

Accordingly, under Section 1405, a simple showing of probable cause for the issuance of the warrant itself sufficed to authorize a nighttime search. See *United States* v. *Stallings,* 413 F. 2d 200 (C.A. 7), certiorari denied, 396 U.S. 972; *United States* v. *Castle,* 213 F. Supp. 52 (C.A. D.C.).

Unlike the combined provisions of Title 33 of the D.C. Code, however, the scope of Section 1405 reached only a limited number of offenses, *i.e.,* those involving marijuana and narcotic drugs such as heroin, opium, and cocaine; it did not reach those stimulant or depressant drugs the use and abuse of which did not become a matter of national concern until the late 1960's. See Materials Prepared by the Administration Relating to Proposed Legislation to Regulate Controlled Dangerous Substances and Amend Narcotics and Drug Laws, before the House Committee on Ways and Means, 91st Cong., 2d Sess., p. 246 (hereinafter "Materials"); Comparison of Bills to Regulate Controlled Dangerous Substances and to Amend the Narcotic and Drug Laws, before the House Committee on Ways and Means, August 8, 1970, p. 17 (hereinafter "Comparison of Bills"); 26 U.S.C. (Supp. II, 1952 ed.) 4761, 4731.

Because of the burgeoning problem presented by such dangerous but non-narcotic drugs, the President proposed the Comprehensive Drug Abuse Prevention

and Control Act of 1970, of which Section 879(a) was a part.[16] This comprehensive statutory framework was aimed at reducing the use of both narcotic and stimulant/depressant types of drugs:

> The other side of the drug abuse problem is the illicit traffic in drugs which is both international and interstate in scope. There is an unknown quantity of the nonmedical and nonprescription drugs (heroin, cocaine, marijuana) being continuously smuggled into this country. At the same time, there are substantial amount of prescription drugs, such as the stimulants, depressants and tranquilizers being diverted into illegitimate channels. For example, according to estimates of the National Institute of Mental Health, 50 percent of the over 8 billion annually produced amphetamine pills find their way into nonmedical channels. This diversion is in addition to drugs produced illegally in clandestine laboratories. [S. Rep. No. 91–613, 91st Cong., 1st Sess., pp. 3–4.]

As part of this effort "to strengthen existing law enforcement authority in the field of drug abuse" (preamble to the Drug Abuse Act, 84 Stat. 1236), 21 U.S.C. 879(a) was proposed to replace 18 U.S.C. 1405. Whereas the earlier statute had permitted nighttime

[16] In his message to Congress proposing the Drug Abuse Act, the President stated (Materials, *supra*, at p. 1):

"Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans.

"A national awareness of the gravity of the situation is needed; a new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States."

searches upon a simple showing of probable cause only in instances in which the property sought was marijuana or narcotic drugs, Section 879(a) was drafted to provide for such nighttime searches whenever any contraband drug, including the ever more prevalent stimulants, barbiturates, and tranquilizers were suspected to be present.

2. The Enactment of Section 879(a) Was Not Intended To Change the Liberal Nighttime Narcotics Search Provisions of Its Predecessor

Against this background of congressional concern with "a crescendoing nationwide drug abuse problem" (A. 31) and the demonstrable purpose of Congress to expand liberalized nighttime search provisions to cover additional dangerous drugs, Judge Wilkey rightly concluded that it was "inconceivable" that Congress also sought to constrict pre-existing nighttime search authority in narcotics cases.

Section 879(a) permits service of warrants to search for narcotics or other controlled substances "at any time of the day or night" if the issuing magistrate "is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." While the "probable cause" language derives from a constitutional imperative well fleshed out by judicial decisions and therefore requires no special definition or elucidation, the meaning of the rest of the clause is uncertain. Neither the text of the statute nor the legislative history sheds light on how the magistrate must "satisfy" himself, what constitutes "grounds" (a term with no independent history of judicial or legislative definition), or whether

or how such "grounds" must be demonstrated to the magistrate. Judges Wilkey and Fahy found the clause sufficiently ambiguous that they deemed it both necessary and appropriate to resort to the legislative history and to interpret the statute in accord with the congressional intent disclosed thereby. Petitioner and Judge Robinson find it unambiguous, although, ironically, they are unable to agree on its meaning.

We agree that, considered in a vacuum, the language of the clause tends to support the view that some special showing is required to obtain authorization for nighttime execution of a warrant under Section 879(a). However, the legislative history of that provision shows that "no change was intended in application or meaning of section 1405(1) [the predecessor statute] with the enactment of section 879(a)," *United States* v. *Thomas*, C.A. 5, No. 73–1403, decided December 19, 1973, slip op. 24.

Thus, both the House and Senate reports clearly state (H. Rep. No. 91–1444, 91st Cong., 2d Sess., Part I, p. 54; S. Rep. No. 91–613, 91st Cong., 1st Sess., pp. 30–31):

> Subsection (a) of this section [21 U.S.C. 879] incorporates 18 U.S.C. 1405 and authorizes service of a search warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U.S. magistrate issuing the warrant.

Since Section 1405 liberally authorized nighttime execution of narcotics search warrants (see pp. 32–33, *supra*) and required a showing of probable cause only as to the offense and the location of the narcotics at

the place to be searched, the congressional intent to leave unchanged the nighttime search authorization—simply expanding it to other categories of drug offenses—is clearly confirmed.[17]

Moreover, the legislative history is utterly devoid of indications that Congress affirmatively intended to restrict existing nighttime search authority in narcotics cases when it enacted Section 879(a). This is in striking contrast with the action of the same (91st) Congress in adopting general provisions regulating nighttime searches in the District of Columbia in 23 D.C. Code 521–523. The history of those provisions, set out at pp. 35–38 of petitioner's brief, reflects a clear indication of Congress' intent to restrict ordinary nighttime searches to instances in which they are practically "unavoidable." S. Rep. No. 91–538, 91st Cong., 1st Sess., pp. 12–13. In addition, Congress implemented its intention in unmistakable language. Section 522(c) described the showing that must be made if nighttime search authority is requested:

> The application may also contain—
>
> (1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed

[17] Apart from the language quoted in the text, which was taken by the reports from explanatory materials submitted by the Department of Justice in connection with the Drug Abuse Prevention and Control Act of 1970, the other Department explanations of the effect of revising Section 1405 shed little light on the problem, since they merely echo the language of the old and new provisions (Materials, *supra*, at p. 246; Comparison of Bills, *supra*, at p. 17).

> during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances.

Petitioner argues, relying on Judge Robinson's concurring opinion below, that "[i]n the face of an unambiguous statute, resort to the legislative history serves no useful purpose" (Pet. Br. 21). The difficulties inhering in this contention are, however, apparent from the fact that Judge Robinson went on to reject petitioner's claim—based on the "unambiguous" language of Section 879(a)—that the statute was intended to require the same showing of "exigent circumstances" for a federal nighttime narcotics search as are required by 23 D.C. Code 521–523 (A. 49):

> I am convinced that Section 879(a) exacts more for a nighttime search than merely probable cause for a search. I cannot, however, accept appellees' argument that Section 879(a) embraces the criteria for nighttime searches which are contained in the general search warrant provisions of D.C. Code §§ 23–521 to 23–523. To require compliance with those standards in order to activate Section 879(a) would be to strain its wording beyond any perceptible intent of Congress in enacting special measures to control the drug traffic. Whatever may have been its purpose in selecting the language of Section 879(a), it could hardly have sought to limit nighttime searches for controlled drugs as strictly as nighttime searches in non-drug cases.

Thus, while Judge Robinson initially found Section 879(a) "unambiguous" and held that there was no necessity to resort to legislative history, he was him-

self forced to resort to the "perceptible intent of Congress in enacting special measures to control the drug traffic" in order to determine its meaning.

In determining the "meaning" of the words of Section 879(a), every court except the district court below has concluded that Congress did not intend to change the effect of former Section 1405(1). *United States* v. *Thomas,* 294 A. 2d 164 (D. C. Ct. App.), certiorari denied, 409 U.S. 992; *United States* v. *Green,* 331 F. Supp. 44 (D.D.C.); *United States* v. *Thomas,* C.A. 5, No. 73-1403, decided December 19, 1973 (*dictum*). These courts have properly looked to the history of the provision to ascertain and effectuate the congressional intent. See *United States* v. *Sisson,* 399 U.S. 267, 292-293, n. 22; *United States* v. *Apex Distributing Co.,* 270 F. 2d 747, 755 (C.A. 9).

3. If Section 879(a) requires some special showing, that requirement was satisfied here

Assuming Judge Robinson is correct that some kind of showing other than probable cause for issuance of the warrant itself is required for authorization of nighttime execution, we agree with his conclusion that the requirement was satisfied in this case (A. 51, 52):

> The test of reasonable cause for nighttime execution does not demand a demonstration that drugs are positively on the premises at night, or that they could be found on the premises only at night, or that for some reason a search would be impossible in the daytime. It does summon some factual basis for a prudent conclusion that the greater intrusiveness of nighttime execution of the warrant is justified by the exigencies of the situation. The remaining

> question, then, is whether there was justification of that caliber in these cases.
>
> * * * * *
>
> Beyond cavil, the affidavit disclosed and the magistrate found reasonable cause for a nighttime search in each of these cases. The showing went beyond grounds for believing that narcotics were kept on the premises searched; it extended to ground for believing that a drug-peddling operation persisted there. Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated. For this reason, I concur in the conclusion that there was an ample legal and factual basis for the searches, and in reversal of the orders suppressing their fruits.

4. District of Columbia police may execute Federal narcotics search warrants

The fact that the warrant was obtained and executed by members of the Metropolitan Police does not affect its validity under Section 879(a), and petitioner's claim that the federal "Controlled Substances Act deals only with the enforcement powers of members of the Bureau of Narcotics and Dangerous Drugs" (Pet. Br. 35) is without substance. Any federal law enforcement agency with general powers may enforce the federal narcotics law. See, *e.g.*, 18 U.S.C. 3052, 3053, and 3056, wherein agents of the Federal Bureau of Investigation, United States Marshals, and Secret Service Agents, respectively, are empowered to make arrests "for *any* felony cognizable under the laws of the United States if they have reasonable

grounds to believe that the person to be arrested has committed or is committing such felony" [19] (emphasis added).

That members of the Metropolitan Police Department are, by statutory mandate, agents of the federal as well as the local government is apparent from an examination of the United States and District of Columbia Codes. Organization Order No. 153 of 1966 (set out as an appendix to Title 1 of the D.C. Code, p. 222 specifically provides:

> The Metropolitan Police Department shall provide maximum protection of life and property

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[19] 21 U.S.C. 878 does, of course, recognize the authority of the Bureau of Narcotics and Dangerous Drugs, providing that

"Any officer or employee of the Bureau of Narcotics and Dangerous Drugs designated by the Attorney General may—

"(1) carry firearms;

"(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

"(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

"(4) make seizures of property pursuant to the provisions of this subchapter; and

"(5) perform such other law enforcement duties as the Attorney General may designate."

This section was included in the Drug Abuse Act not to limit drug arrests solely to BNDD personnel, but to grant such personnel the authority to make arrests for *any* federal offenses, as opposed to the more limited authority previously vested in drug control agents to arrest only for drug-related offenses under 21 U.S.C. (Supp. V, 1964 ed.) 372(e) and 26 U.S.C. (1958 ed.) 7607. See S. Rep. No. 91-613, *supra*, at p. 30; H. Rep. No. 91-1444, *supra*, at pp. 53-54.

in the community through the prevention and detection of crime, through the enforcement of all local and locally applicable statutes, regulations and ordinances, through the latest techniques of criminology, through an active police-community relations program, *and through cooperation with Federal police agencies in the enforcement of Federal laws.* [Emphasis added.] [20]

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[20] Recognition of the responsibility of the District of Columbia police in enforcing federal laws was established much earlier than this 1966 Order. By President Truman's Reorganization Plan No. 5 of 1952 (Title 1, D.C. Code, Appendix, Supp. V, p. 147), all executive authority was transferred to a three-man Board of Commissioners; specifically included within this transfer was authority over the Metropolitan Police Department (Reorganization Plan No. 5 of 1952, Section 1). In carrying out the presidential mandate to implement the basic reorganization of the District government, the Commissioners accordingly promulgated Reorganization Order No. 46 on June 26, 1953 (Title 1, D.C. Code, Appendix (1961 ed.) p. 110). Like Organization Order No. 153, this rule provided:

"The Metropolitan Police Department is established for the purpose of providing maximum protection of life and property in the community through the prevention and detection of crime and the enforcement of all local and locally applicable statutes, regulations, and ordinances. *In the performance of its municipal functions the Department shall cooperate with Federal police agencies in the enforcement of federal laws.*" (Emphasis added.)

Reorganization Order No. 46 was superseded by Organization Order No. 153, *supra*. Then, with President Johnson's Reorganization Plan No. 3 of 1967 (Title 1, D.C. Code, Appendix, p. 150), the three-commissioner form of government for the District of Columbia was abolished in favor of a single commissioner and nine man council; all functions of the former Board of Commissioners, including authority over the Metropolitan Police Department, were transferred to the new Commissioner (Reorganization Plan No. 3 of 1967, Part IV, Section 401). Subsequently, by Commissioner's Order No. 69-614, November

Moreover, 4 D.C. Code 143 imposes criminal penalties on any district policeman who fails to make an arrest "for an offense against the laws of the United States committed in his presence * * *."

Finally, and most significantly, 4 D.C. Code 138 provides:

> Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force * * *.

As Mr. Justice Douglas noted in his dissent from the denial of certiorari in *Thomas* v. *United States, supra,* 409 U.S. at 992–993, Section 138 specifically authorizes the District police to execute federal search warrants.[21]

13, 1969, Organization Order No. 153 was ratified with respect to the functions of the Metropolitan Police Department (Title 1, D.C. Code, Appendix, p. 257).

[21] Similarly, Rule 41 as amended, effective October 1, 1972, provides, *inter alia*:

"(a) A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a federal law enforcement officer * * *

* * * * *

"(h) * * * The phrase 'federal law enforcement officer' is used in this rule to mean any government agent * * * who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

Demonstrating the long established view that District police were agents of the federal government, the Attorney General, on March 12, 1973, listed the Metropolitan Police Department among those agencies authorized to request federal search warrants. See A.G. Order 510–73, 38 Fed. Reg. 7244–7245.

While it is true that 18 U.S.C. (1964 ed.) 1405, the predecessor of Section 879(a), contained a specific provision authorizing the District police to execute federal narcotic search warrants, whereas 21 U.S.C. 879 does not, that fact is not controlling. As Mr. Justice Douglas suggested in his dissent in *Thomas* v. *United States, supra,* 409 U.S. at 993, failure to mention the District police by name in Section 879 did not mean that Congress intended to preclude the District police from executing warrants under that section. Rather, it is fair to assume that the explicit provision of former Section 1405 was dropped because unnecessary, since the District police are empowered to enforce federal laws and execute federal search warrants by 4 D.C. Code 138.

D. ASSUMING THE SEARCH WAS A NIGHTTIME SEARCH, 23 D.C. CODE 521–523 IS INAPPLICABLE HERE

Although petitioner attempts to show that the warrant did not comply with Section 879(a), his principal claim is that Section 879(a) is not applicable here at all (Pet. Br. 13), and that "the legislative concern about unnecessary nighttime intrusions and protection of civil liberties in the District of Columbia as expressed in §§ 521–523 [of Title 23] reflects the intent of Congress that all warrants directed to the D.C. police after February 1, 1971, were to adhere to the requirements of Title 23" (Pet. Br. 31).

Petitioner's claim, in effect, is that even if Section 879(a) permits a nighttime search without a showing of necessity in cases of suspected violations of the

United States Code, that statute is only applicable where the search is conducted by "members of the Bureau of Narcotics and Dangerous Drugs" (Pet. Br. 34, 35).

Under this view, the validity of such a search warrant would depend upon the identity of the person who applies for the warrant, and since the warrant here was obtained by members of the Metropolitan Police, it would be invalid to authorize nighttime execution because the showing required by 23 D.C. Code 521–523 was not made. This claim is predicated on a number of erroneous legal assumptions.

1. We do not understand how petitioner can allege that Congress intended that "all warrants," *including those in narcotics cases,* directed to the District of Columbia police after February 1, 1971, must adhere to the requirements of Title 23 (Pet. Br. 31), when, as petitioner concedes (*id.* at 34, n. 49), Congress did not repeal the special provisions in Title 33 of the D.C. Code which permit nighttime searches to be made in narcotics cases without any special showing. It is somewhat anomalous, to say the least, to argue that when the Metropolitan Police obtain a nighttime warrant in cases involving a suspected violation of the local narcotics laws no special showing need be made (indeed, the magistrate is powerless to withhold authority for nighttime execution), but that when they obtain such a warrant—as they are clearly authorized to do (see pp. 41–43, *supra*)—in cases involving a suspected violation of federal narcotics laws, such a

special showing is required by 23 D.C. Code 521–522 (even though not required under 21 U.S.C. 879(a)).[22]

2. This consideration aside, there is nothing in the legislative history of 23 D.C. Code 521–523 that establishes any such intent on the part of Congress.

Prior to the passage of the Court Reform Act (of which 23 D.C. Code 521–523 were a part), the local court system of the District—specifically, the Court of General Sessions—had criminal jurisdiction solely over misdemeanors and petty offenses. See 11 D.C. Code (1967 ed.) 963. Felony prosecutions for violations of either the District of Columbia Code or the United States Code were tried in the United States District Court for the District of Columbia. See 11 D.C. Code (1967 ed.) 521. In order to ease the resultant burden upon the United States District Court, the Court Reform Act provided for a new local court of

[22] Petitioner states: "We are not arguing here—because we do not need to—that D.C. Code §§ 23–215 *et seq.* impliedly repeals D.C. Code §§ 33–414 (Supp. IV, 1971). That conflict is not before this Court because the search warrant here was clearly issued for suspected violations of the federal (U.S. Code) narcotics laws; the D.C. Code's Uniform Narcotic Drug Act (33 D.C. Code §§ 401–425) plays no part here" (Pet. Br. 32, n. 45).

We have shown in Part I(B)(2), *supra*, that the warrant application here established a violation of the D.C. Code's Uniform Narcotic Drug Act and that the warrant was therefore valid under 33 D.C. Code 414(h). But even if the warrant in this case was technically deficient for some reason (such as failure specifically to allege a Title 33 violation), the failure of Congress to repeal Section 414(h) would seem to sap any vitality from petitioner's claim that Title 23 governs "all warrants directed to the D.C. police after February 1, 1971," even when such a warrant is obtained pursuant to Section 879(a).

general jurisdiction, the Superior Court of the District of Columbia (11 D.C. Code 901). The Superior Court was given jurisdiction over any criminal case under any law applicable exclusively to the District of Columbia (11 D.C. Code 923(b)), while the district court's jurisdiction over local criminal offenses was restricted to prosecutions involving violations of the United States Code (11 D.C. Code 501, 502).[23]

It was because of the establishment of this new local court system with a widely expanded criminal jurisdiction that Title 23 was amended as part of the Court Reform Act. When local felonies had been tried in the United States District Court, the applicable rules observed were, of course, those of the Federal Rules of Criminal Procedure. With the creation of the new local court system, however, Congress deemed it advisable to provide at least in part a separate set of criminal procedure rules applicable solely to local District criminal prosecutions: "The Superior Court shall conduct its business according to * * * the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules." 11 D.C. Code 946. Title 23, including the search warrant procedures contained therein, was intended to apply precisely to the new local court system and to prosecutions brought

[23] For a thorough analysis of that Act, see Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L. J. 477 (1971); Kern, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 Am. U. L. Rev. 237 (1970–1971); see also *Palmore* v. *United States*, 411 U.S. 389.

within it and not generally to the District police when engaged in investigations of violations of federal law.[24]

Moreover, to the extent that the legislative history of Sections 521–523 sheds light on the issue here, it shows that Congress intended principally to replace the test of Rule 41(c), Fed. R. Crim. P. (18 U.S.C. App., 1970 ed.), which permitted nighttime searches only when the affidavits were positive that the property sought was on the premises to be searched;[25] this test was the only one applicable in the District of Columbia, except, of course, in the case of drug-related searches as to which 33 D.C. Code 414(h) and 709(b) and 18 U.S.C. (1964 ed.) 1405(1) applied. Fed. R. Crim. P., Rule 41(h) formerly Rule 41(g)).[26]

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[24] As the Deputy Attorney General stated to Congress:

"In matters of criminal law and procedure the transfer of felony jurisdiction to a local court necessitated many changes. The local misdemeanor procedures and the local code were not adequate to handle matters which are [sic] previously in Federal courts drawing on the procedures of the Federal rules and the Federal code." [Crime in the National Capital, Hearings before the Committee on the District of Columbia and Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 1066, S. 1067, S. 1214, S. 1215, S. 1711, and S. 2601, 91st Cong., 1st Sess., Part 3, p. 1153.] See also testimony of Associate Deputy Attorney General Santarelli, D.C. Crime Hearings, *supra*, at p. 13; Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U.L. Rev. 252 (1970–1971).

[25] We note that the instant warrant, in authorizing the search "at any time in the day or night," cited and quoted Rule 41(c) (A. 10–11). Officer Green's affidavit was in fact "positive" that narcotics were in petitioner's apartment (A. 9).

[26] At the time Title 23 was proposed and enacted into law, former 18 U.S.C. 1405 had not yet been modified by and replaced by 21 U.S.C. 879(a). See, *infra*, p. 52, n. 30.

The test for nighttime searches under the proposed Title 23, it was explained, was different from Rule 41 (c), and provided that nighttime searches would be permitted, *inter alia,* when there was probable cause to believe that the property sought would not be found during daylight hours:

> The District of Columbia Code presently contains no provision at all governing the time for execution of a search warrant. Rule 41(c) of the Federal Rules of Criminal Procedure, however, requires that for a nighttime search the affiant be "positive that the property is on the person or in the place to be searched." * * *
>
> Because of the greater potential intrusion upon the privacy of persons from a nighttime search, there should be some justification for it. The positivity test of the Federal Rules of Criminal Procedure is inadequate for two reasons. First, it is essentially an unrealistic test: under what circumstances can a law enforcement officer actually be "positive" that property is in a certain place unless at the time he is applying for the warrant he is in contact with a reliable informant who is at that place? Second, even if it is assumed that a positivity requirement can be satisfied, it still permits the greater instrusion upon privacy in some cases when there is no urgent need for it. It makes better sense to limit the nighttime intrusion to those situations in which the property may not be found unless a nighttime search is permitted, that is, to maintain the same standard of certainty—probable cause to believe—but to re-

> quire the applicant to establish, and the judicial officer to find, specific justification for a nighttime search, i.e., that the property may be removed or destroyed if not seized forthwith or that the property is to be found only at nighttime. [D.C. Crime Hearings, *supra,* at p. 1404.]

Petitioner does not claim that the new test in Sections 521–523 repealed the special provisions of Section 879(a) of the United States Code applicable to narcotics searches.[27] (Indeed, the legislative history totally fails to establish the clear affirmative intent necessary to effect an implied repeal of any of the special narcotics search statutes, or of the laws authorizing the Metropolitan Police to execute federal search warrants.)[28] His claim that the validity of a nighttime search in the District of Columbia in cases involving suspected violations of the United States Code should depend on the uniform worn by the law

[27] While we agree with petitioner that the new test contained in Sections 521–523 provides greater protections for civil liberties than the old "positivity test," we note that the change was roundly condemned by those who opposed the legislation on civil libertarian grounds. D.C. Crime Hearings, *supra*, at pp. 1493, 1499, 1527.

[28] It is true that the Department of Justice erroneously informed Congress that there were no provisions in the D.C. Code relating to nighttime searches, overlooking the provisions of Title 33. However, it is sheer speculation to surmise what Congress would have done had it been aware of the special drug-related search provisions. They might have chosen to repeal them, but that would have been a conscious determination that would surely have entailed a closer look at the special circumstances surrounding searches for drugs. Implied repeal should not be founded on such a flimsy and speculative basis.

enforcement officer executing it is thus without support in legislative history of Sections 522–523.[29]

3. As we have shown, 21 U.S.C. 879(a) and Title 23 of the D.C. Code are not conflicting provisions; rather, they mesh into a logical framework of law enforcement authority and regulations applicable in different contexts. The former governs District police when enforcing federal drug laws. The latter covers their actions when acting in the capacity of local law enforcement officers in non-drug cases. However, if the Court were to perceive a lack of harmony between the provisions, Section 879(a) should be given effect over the D.C. Code provisions under basic principles of statutory interpretation.

First, "* * * when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms." Sutherland, *Statutory Construction*, § 23.17, p. 251 (4th ed., 1972). Here, although Section 879(a) went into effect prior to Title 23, the Drug Abuse Act was considered and passed after the Court Reform Act.[30] Secondly, "[t]he subsequent en-

[29] There is no claim here, nor can there be in light of 33 D.C. Code 414(h), that the local law enforcement officers deliberately specified a violation of the United States Code in their application for the warrant in order to avoid more restrictive local laws.

[30] The two statutes were considered approximately contemporaneously during the 91st Congress. The Drug Abuse Act passed the Senate on January 28, 1970, the House on September 24, 1970, and was enacted on October 27, 1970. The Court Reform Act passed the Senate on September 18, 1969, the House on March 19, 1970, and was enacted on July 29, 1970.

actment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals pro tanto the provisions of the general statute with which it irreconcilably conflicts." Sutherland, *op. cit., supra,* § 23.16, at p. 248. As the court below noted, although Title 23 is specific geographically, Section 879(a) is "clearly the more specific or 'special' provision as to *subject matter-search in narcotics cases*" (A. 28; emphasis in original).

Finally, 21 U.S.C. 903 provides that in the event of "a positive conflict between * * * this subchapter and * * * State law so that the two cannot consistently stand together," the federal law must prevail. Since 21 U.S.C. 802(24) defines the term "State," as used in the subchapter in which Section 879(a) appears, as including the District of Columbia, any conflict between Section 879(a) and 23 D.C. Code 521–523 would have to be resolved in favor of Section 879(a).

II. EVEN IF THE WARRANT FAILED TO COMPLY WITH THE APPLICABLE STATUTORY PROVISIONS FOR NIGHTTIME SEARCHES, THERE IS NO BASIS FOR THE INVOCATION OF AN EXCLUSIONARY RULE

1. The warrant and the underlying affidavit here at issue complied in all respects with the Warrant Clause of the Fourth Amendment, and petitioner does not argue otherwise. There is therefore no basis here for the application of the exclusionary rule, which "was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amednment." *Davis* v. *Mississippi,* 394 U.S. 721, 724; *United States* v. *Calandra,* No. 72–734, de-

cided January 8, 1974, slip op., p. 8. Moreover, there is likewise no exclusionary rule expressly mandated by the language of the Act of Congress that allegedly was not complied with here. Compare *Nardone* v. *United States,* 302 U.S. 379; *Lee* v. *Florida,* 392 U.S. 378, 386–387. Under these circumstances, the authority for the application of an exclusionary rule must derive from "the supervisory authority over the administration of criminal justice in the federal courts," pursuant to which this Court "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U.S. 332, 341.

The formulation of evidentiary rules based on this Court's supervisory powers is guided principally "by considerations of justice" (*ibid.*). This process necessarily affords substantial room for the exercise of discretion to determine whether an evidentiary rule of exclusion in a given case is essential "so as to effectuate the policy which Congress has formulated." *Nardone* v. *United States,* 308 U.S. 338, 340; *McNabb* v. *United States, supra; United States* v. *Walden,* C.A. 4, No. 72–1931, decided January 10, 1974. There is no basis for the exercise of that discretion in favor of suppression in the instant case.

2. Although a recent study has concluded that "[a]s a device for deterring illegal searches and seizures by the police, the exclusionary rule is a failure" (Oaks, *Studying The Exclusionary Rule In Search and Seizure,* 37 Chi. L. Rev. 665, 755 (1970)), we do not here challenge the assumption that an exclusionary rule

does in fact tend to encourage obedience by law enforcement officers to constitutional and statutory commands. To the extent that it serves this function, as Professor Amsterdam has written, "the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, And Section 2255: A Comment,* 112 U. Pa. L. Rev. 378, 389 (1964).[31]

Accepting the proposition that the application of an exclusionary rule does operate to deter law enforcement officers from conducting warrantless searches and seizures in instances where they desire to make evidentiary use of the items seized, it is nevertheless our submission that once authorization for the search has been obtained in good faith from a neutral and detached magistrate, and there is a defect in procedure resulting from an error of judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement officers and should be eschewed.

Indeed, application of the exclusionary rule in a case such as this ignores the vital role which the magistrate is assigned and performs under the Constitution. Unlike instances in which police officers act on their own initiative, and in which an exclusionary rule is perhaps the only deterrent to misconduct, the

[31] And, indeed, even in Fourth Amendment cases, this Court has restricted "the application of the [exclusionary] rule * * * to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, slip op., at p. 10.

warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *United States* v. *Lefkowitz,* 285 U.S. 452, 464; *Johnson* v. *United States,* 333 U.S. 10, 14; *Jones* v. *United States,* 362 U.S. 257, 270–271. And for that reason, this Court has recognized that not all errors of judgment by a magistrate are to be treated in the same manner as errors by law enforcement officers acting on their own initiative.

Where, for example, resort has been had to a magistrate and a search has been undertaken pursuant to his direction, the validity of the search will be judged by less exacting standards than if the law enforcement officers had acted without such authorization.[32] As Mr. Justice Goldberg observed in *Aguilar* v. *Texas,* 378 U.S. 108, 111, quoting *Jones* v. *United States,* 362 U.S. 257, 270–271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present * * *.

[32] Presumably, but for their concern for the safety of their informant, the officers could have made a warrantless arrest of petitioner in his apartment on the evening of February 9, right after his sale of heroin to the informant. It is ironic that the problems for this prosecution arise from the election to obtain a warrant from a magistrate for a later authorization to enter his apartment.

Again, in *United States* v. *Ventresca,* 380 U.S. 102, 106, this Court, emphasizing "the preference to be accorded searches under a warrant," indicated that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."

While we agree with the admonition in *Aguilar* that reviewing courts must still "insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp" (378 U.S. at 111), where the record clearly indicates that the magistrate has performed his function—where, in the words of Judge Friendly, there was "reasonable cause to believe there was reasonable cause" [33]—there is no necessity for the application of an exclusionary rule, particularly where the error is not of constitutional dimension. Compare, A.L.I., *A Model Code of Pre-Arraignment Procedure,* § 290.2 (Official Draft No. 1, July 15, 1972).

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[33] Speaking to this issue generally, Judge Friendly has written (Friendly, *Benchmarks*, pp. 260–261 (1967)):

"The very use of the word 'deter' suggests the analogy of the criminal law. But to achieve its end the criminal law does not usually impose punishment on one whose violation has come from mistake rather than evil motives and, at least in its modern development, it leaves latitude to the judge as to the degree of punishment to be exacted. It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be enforced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court. At least in cases of this sort, where, in contrast to confessions of dubious reliability, the evidence cannot impair any proper defense on the merits, the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or fla-

3. The record in the instant case shows that law enforcement officers, following the command of the Fourth Amendment, filed a detailed affidavit fully complying with the two-pronged test of *Spinelli* [34] and *Aguilar* [35] for establishing probable cause for a search based on information supplied by an informant. The application for a warrant was made only a short time after the adoption of 21 U.S.C. 879(a) and 23 D.C. Code 522–523, and there was every reason to justify the belief that those statutes had not imposed any additional requirements for searches conducted at night. Indeed, not only was the United States Commissioner satisfied that no further showing was required, but the United States Court of Appeals and the District of Columbia Court of Appeals subsequently confirmed that judgment. Moreover, even the district court judge who granted the motion to suppress recognized that "[t]he search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions" (A. 21).

This case is thus wholly different from those cases in which this Court has invoked its supervisory powers to exclude relevant evidence because the application of an exclusionary rule was essential to

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grantly illegal—where there was no reasonable cause to believe there was reasonable cause." [Footnote omitted.]

See also, *United States* v. *Soyka*, 394 F. 2d 443, 452 (C.A. 2) (Friendly, C.J., dissenting from panel decision prior to rehearing *en banc* decision); *United States* v. *Edmons*, 432 F. 2d 577, 585 (C.A. 2) (Friendly, C.J.) (dictum).

[34] *Spinelli* v. *United States*, 393 U.S. 410.

[35] *Aguilar* v. *Texas*, 378 U.S. 108.

"compel respect for federal law" and to prevent federal courts from serving as "accomplice[s] in the willful transgression of the 'Laws of the United States.' " *Lee* v. *Florida,* 392 U.S. 378, 386–387; cf. *United States* v. *Calandra, supra,* slip op., at p. 17, n. 11. This is not a case of a deliberate or "willful transgression" of an Act of Congress, nor is it a case in which the law enforcement officers presented an affidavit which no reasonable magistrate could have believed satisfied the commands of the statute (as it was then understood). Most significant of all, the law enforcement officers did not act on their own initiative, but followed the procedure of "antecedent justification before a magistrate that is central to the Fourth Amendment." *Eaton* v. *Price,* 364 U.S. 263, 272 (Brennan, J., concurring).

While it may be difficult to define the circumstances under which the "deterrent efficacy" of the exclusionary rule "reaches a point of diminishing returns" and "its continued application [becomes] a public nuisance" (Amsterdam, *supra,* 112 U. Pa. L. Rev. at p. 389), it seems safe to say that this point has been reached in the circumstance where law enforcement officers conduct a search pursuant to a warrant that they have obtained in good faith from a neutral and detached magistrate. By compelling resort to a United States magistrate, the exclusionary rule has served its deterrent function. Application of the exclusionary rule where resort has been had to a magistrate would, under the circumstances of this case, be nothing short of the imposition of absolute liability on police and magistrates, to the detriment of the criminal justice system and the interests of the public.

As this Court implicitly recognized in *Jones, Aguilar,* and *Ventresca,* an exclusionary rule can never operate to prevent good-faith errors of legal judgment on the part of the magistrate or law enforcement officers. The only consequence of its application here will be to leave a seller of heroin on the street and defeat the oft-declared policy of Congress in favor of vigorous enforcement of the narcotics law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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